No. 88-1506

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

JOE E. FRYAR,

Petitioner,

versus

EDWARD C. ABELL, JR. AND CAREY WALTON, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF PURCHASERS OF WESTSIDE HABILITATION CENTER REVENUE BONDS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF ON BEHALF OF EDWARD C. ABELL, JR. AND CAREY WALTON, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF PURCHASERS OF WESTSIDE HABILITATION CENTER REVENUE BONDS OPPOSING JOE E. FRYAR'S PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the "pattern of racketeering" requirement under the Racketeer Influenced Corrupt Organizations Act ("RICO") is satisfied by a showing that the petitioner engaged in a myriad of criminal activity involving securities fraud, mail fraud, wire fraud, welfare fraud and state law fraud involving hundreds of separately indictable offenses spanning a decade and resulting in losses to over five hundred investors, and culminating in the affirmance of the petitioner's criminal conviction for attempting to tamper with the civil jury in this case?

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STATEMENT OF THE CASE

1. Introduction.

Petitioner Joe E. Fryar ("Fryar") seeks review of a decision of the United States Court of Appeals for the Fifth Circuit ("court of appeals") affirming in part a jury verdict rendered after a nine week trial in favor of the plaintiff class, finding Fryar and All American Service Co., Ltd. ("AA"), a Bermuda corporation organized and controlled by Fryar, liable for violations of RICO.[1] Fryar attacks the court of appeals' decision, asserting that the RICO claims must fall because respondents only established evidence of a "single, limited fraudulent scheme" which does not constitute a "pattern of racketeering action". Fryar's petition is meritless. The evidence established multiple episodes or acts spanning ten years and defrauding in excess of five hundred investors. Such evidence establishes a "pattern of racketeering activity" under the most restrictive standard enunciated by any court of appeals. Moreover, Fryar, has waived his right to assert that issue because he failed to raise it in the courts below.

2. Background.

This action arises out of a scheme launched in 1976 and continuing, through and including the trial in 1986,

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[1] The court of appeals reversed in part the jury verdict in favor of the class on its claims under the federal securities laws. The plaintiff class filed a Petition For Certiorari, seeking review of that part of the decision. The case was docketed as "Edward C. Abell, Jr. and Carey Walton v. Wright, Lindsey & Jennings, et al.", No. 88-1518.

designed to enrich, among others, Fryar and his Bermuda corporation, AA. In essence, Fryar formed an allegedly non-profit corporation, Westside Habilitation Center, Inc. ("Westside") to own and operate a home for the mentally retarded in Cheneyville, Louisiana. Fryar, with the assistance of AA and others, caused Westside to issue bonds in the amount of $13,550,000 to the public and used the proceeds to finance the acquisition and construction of the facility at grossly inflated prices for his own enrichment. Fryar, thereafter, reaped substantial profits during his operation of the facility by, among other things, submitting false reimbursement claims to the State of Louisiana Medicaid program and refusing to pay the bondholders interest due. Fryar concealed the fraud by interposing AA in the chain of title to the property purchased by Westside and by failing to disclose to Westside's accountant the true state of affairs. Fryar's and/or AA's concealment of the deceit continued throughout this litigation by concealing documents, fabricating documents, threatening a witness to prevent his appearing to testify, and finally by attempting to bribe the jury at trial.[2]

a. Origin of the Project.

Fryar masterminded the Westside project. First, he obtained certification from the State of Louisiana to build a facility having a projected cost of $1,983,500, despite opposition from officials in the Louisiana Department of

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[2] Fryar subsequently was convicted of attempting to bribe the jury. *U.S. v. Fryar*, No. CR-87-60027-01 (W.D. La. 1988). Fryar's conviction was affirmed by the court of appeals. *U.S. v. Fryar*, No. 88-4200 (5th Cir. March 1, 1989). A-38.

Health and Human Resources because of the excessive costs, anticipated substantial profit and questionable need.

Next, Fryar purchased 6.47 acres and a thirty year old vacant school building in Cheneyville, Louisiana ("Cheneyville Property") from the Rapides Parish School Board for $100,000, its appraised value. Fryar then hired his attorney to incorporate Westside, which had no capital assets.

Although a five member board of directors of Westside was appointed, the board never collectively made any decisions on behalf of Westside. Rather, Fryar made all decisions, including setting the purchase price for the Cheneyville Property as well as his own fees. As found by the district court, "Fryar fomented and directed the Westside project, and Fryar, not the board of directors, actually made all important decisions".

When Fryar was unable to obtain conventional financing for the project, he turned to the possibility of financing through tax-exempt bonds. Fryar enlisted the assistance of Joseph D. Hancock ("Hancock") and his underwriting firm, Hancock, Joseph & Daniels ("HJD") with whom he had previously worked on a similar bond financing for public housing projects in Louisiana. At the time Hancock and HJD were the subject of investigations by the F.B.I., S.E.C. and NASD.

To facilitate the marketing of tax-exempt bonds, Fryar hired Booz, Allen & Hamilton, Inc. ("Booz Allen"), a nationally known consulting firm with extensive experience in evaluating health care facilities in Louisiana, to

evaluate the feasibility of the project. Booz Allen concluded that the project was not financially feasible, noting several areas of concern. Despite subsequent consideration of possible solutions, Booz Allen never retracted its concerns regarding the financial structure of Westside. Fryar thereafter threatened Booz Allen with suit because of its adverse conclusions. Booz Allen then agreed to sign a letter drafted by underwriter's counsel which merely noted that Booz Allen's conclusions may not necessarily still be applicable. The letter did not state that Booz Allen's concerns regarding the financial structure had been ameliorated. Undeterred, Fryar retained a firm with little experience in health care and with no knowledge of the Louisiana Medicaid program from whom he obtained a favorable report.

Fryar continued to encounter other difficulties in effecting his scheme. He initially sought approval from the Louisiana State Bond Commission for the Westside bond issuance. The Commission, however, declined to approve financing for Westside bonds due to, among other things, questions regarding the principals involved, the amount of profit anticipated to enure to the principals, and opposition to the project by officials of the State of Louisiana Department of Health and Human Resources. Still undeterred, Fryar was able to circumvent the Commission by convincing the town of Cheneyville to approve a bond issuance by Westside in the amount of $12,850,000 pursuant to an obscure and seldom used revenue ruling. Although the town's official records only reflect approval of a bond issuance in the amount of $12,850,000, bonds in the amount of $13,550,000 were issued and the resolution in the closing documents

reflects approval of the larger issuance. According to the testimony of the Cheneyville Town Clerk, the resolution was altered.

b. The Property Transaction.

Fryar determined that he would be paid in excess of $5,000,000 to renovate, construct and operate the facility for an estimated seven months until it became self-sufficient. In addition, Fryar decided to inflate by over $2,300,000 the price to be paid by Westside to purchase the Cheneyville Property he bought for $100,000. Frequently using the mails and wires to communicate messages and transmit documents, Fryar and AA devised a complicated transaction to conceal Fryar's profit and avoid payment by Fryar of taxes on his huge profit. Fryar, first sold the Cheneyville Property for $150,000 in late 1981 to AA, his Bermuda corporation. In order to give the transaction a semblance of regularity, the act of sale whereby Fryar sold the property to AA was dated August 21, 1981, notwithstanding that AA had not been organized as of that date. The funds for AA's purchase were obtained from Fryar's underwriting account in a related Bermuda company. AA then resold the Cheneyville Property to Westside for $2,459,700 – $2,000,000 in Westside bonds and the remainder in cash. Retaining its ownership interest in the bonds, AA pledged the bonds to secure Fryar's performance as developer, an obligation undertaken by Fryar pursuant to the development agreement for which he was to be paid $5,000,000. This transaction accomplished several things. First, it concealed from investors the fact that Fryar realized an additional $2,000,000 on the property transaction and would receive

substantial tax-free interest payments on the $2,000,000 bonds.[3] The transaction also concealed from investors that Fryar had no money at risk, and, that in fact, the investors themselves were providing the security for Fryar's performance.

Although Fryar contends that the $2,459,000 was paid to AA for assuming Fryar's obligations under the development agreement, as found by the district court, "[such assertion . . .] is completely belied by the evidence adduced at trial. . . ."[4] The evidence of AA's assumptions of Fryar's obligations for which he was to be paid $5,000,000 was "a copy of resolution, with no available original, which resolution was not produced during discovery and which mysteriously appeared during the course of the trial."[5] Fryar also relies on a handwritten letter from AA's President dated November 24, 1981 as proof of AA's assumptions of his obligations. The trial court questioned the authenticity of this letter, stating:

> The evidence presented by defendants to prove All American's obligations on behalf of Joe Fryar, in consideration for receiving $2,459,000 for a piece of property that cost it only $150,000, was a letter from All American which mysteriously appeared during the course of the trial. The letter was dated November, 1981, wherein All American agreed to buy the property which it had already purchased in August, 1981. . . .[6]

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[3] As of trial, Fryar and AA had received approximately $900,000 in interest payments on the $2,000,000 bonds.

[4] A-17.

[5] A-17.

[6] A-9.

In fact, the trial court found that AA was "organized for the express purpose of concealing that a profit in excess of $2 million was to be made on the sale of the Cheneyville property".[7]

c. The Bond Issuance.

Fryar proceeded to issue the bonds with the assistance of the other defendants. As found by the court of appeals, the bonds were sold using sales circulars erroneously portraying Fryar as having $2,000,000 at risk.

d. Fryar's Operation of Westside.

Fryar thereafter constructed and operated Westside. During Fryar's operation, he submitted reimbursement claims to the State of Louisiana Medicaid program which misrepresented the true cost of the facility, the obligations of Westside and the fact that the bondholders were not being paid the interest owed. As a result of these misrepresentations, Fryar received payments from the State of Louisiana Medicaid program substantially in excess of what should have been paid. More importantly, Fryar pocketed the money paid as reimbursement on debts to the bondholders, thereby profiting personally by an amount in excess of $1,300,000. Westside's own accountant admitted on cross-examination that such misrepresentations constituted medicaid fraud.

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[7] A-14.

e. The Litigation.

Fryar's fraud and deceit continued throughout this litigation. During the pretrial discovery proceedings, Fryar and AA attempted to thwart and obstruct these proceedings. For example, although respondents sought for over two years to obtain all documents from AA pertaining to the transaction at issue by subpoenas and requests for production of documents, on the eve of trial AA produced previously undisclosed copies of documents purporting to be corporate records of AA, correspondence between AA and Fryar, and correspondence between AA and its counsel. The originals of the "new documents" were not produced, notwithstanding the questionable authenticity of the copies.

Fryar's and AA's attempt to circumvent the rules went far beyond its concealment of documents. They also interfered with discovery by threatening a witness to dissuade him from testifying. Prior to trial, respondents sought to take the deposition testimony in Bermuda of AA's officer and auditor, Ian Fleming. Mr. Fleming's testimony was critical because AA had consistently produced as representatives persons with no personal knowledge of the transaction at issue. These persons, in fact, testified that Mr. Fleming was more competent to testify in the matters at issue.

Although Mr. Fleming originally agreed to appear for his deposition, he failed to appear. He then moved through an attorney previously representing AA to quash the subpoena requiring his appearance. Mr. Fleming's change of heart resulted from threats by AA to dissuade him from testifying as established by a telex discovered

during trial.[8] After a two day evidentiary hearing during trial, the trial court held that although the telex came from Bermuda, its probative value was outweighed by the prejudicial effect.[9] The trial court further held that because AA had refused to produce Mr. Fleming and Mr. Quin, its Bermuda attorney and the addressee of the telex as required by court order, a jury instruction regarding the adverse inference or their failure to testify would be given.

f. Bribery of the Jury.

Fryar's final attempt to thwart justice occurred during the trial when he attempted to bribe two of the jurors. A little over a month into the trial, the trial judge received information from the F.B.I. that Fryar was attempting to bribe several members of the jury. The judge questioned the F.B.I. agent *in camera*, outside the presence of the defendants and their attorneys, satisfying itself that probable cause existed to believe that Fryar indeed had attempted to bribe two jurors. Prior to charging the jury, the judge excused the two jurors whom Fryar attempted to bribe.

Fryar subsequently was convicted of eight counts of obstruction of justice. The Fifth Circuit recently affirmed his conviction.

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[8] The telex is reprinted in the Appendix at A-27.

[9] A-52.

3. The Proceedings Below.

Although prior to charging the jury, the district court considered proposed jury instructions, Fryar never requested an instruction that a pattern of racketeering activity requires proof of at least two fraudulent schemes or other factors from which a threat of continuing activity may be inferred.[10] The jury returned a verdict in favor of plaintiffs on all counts. The jury specifically found that Fryar and AA violated §§ 1962(a), (b) and (c) of the RICO Act.[11] After the entry of judgment, Fryar filed a motion for J.N.O.V., claiming, *inter alia*, that there was insufficient proof to establish a RICO violation. Fryar argued:

> If the Plaintiffs could have demonstrated that Fryar had, in fact, committed at least two acts of securities fraud or mail fraud or wire fraud, or some combination of these three, within a ten-year period, then they would have satisfied this essential element of their claim. The proof, however, simply did not support the Plaintiffs' position. . . .
>
> In conclusion, it is clear that in failing to establish that Fryar committed securities fraud, mail fraud, or wire fraud, the Plaintiffs have not proven that Fryar committed at least two predicate acts within a ten year period.[12]

The district court denied Fryar's motion, stating "[t]he evidence adduced at trial convinces this court beyond any doubt that the jury's verdict is reasonable".

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[10] A-28.

[11] Fryar's Appendix 106-107.

[12] A-30-31.

On appeal, Fryar reiterated his argument that reversal of the RICO judgment was required because of the failure to prove the commission of at least two predicate acts.[13] Contrary to assertions made in this petition, Fryar has not contended until now that reversal is warranted in the absence of proof of two fraudulent schemes or a threat of continuing activity. The court of appeals rejected Fryar's argument, concluding "the evidence strongly supports the jury's RICO verdict". The court explained:

> The record amply supports the jury's conclusion that Fryar, intending to defraud potential investors, devised and employed a scheme to sell Westside bonds. Fryar knowingly misled prospective bondholders about a land transaction that significantly affected Westside's financial structure. He falsely suggested that he had backed the health care project with $2,000,000 of his own money. Obviously, the jury could find that Fryar had a reasonably calculated plan to deceive persons of ordinary prudence and comprehension into giving Westside his money.
>
> Nor does Fryar contest whether he used the mails repeatedly to execute this scheme; indeed, the evidence is overwhelming that he did.[14]

4. Fryar's Petition For Certiorari.

Contrary to his prior contentions that proof of a "pattern of racketeering activity" requires proof of at least two predicate acts within a ten year period, Fryar now argues that proof of at least two fraudulent *schemes* or other factors from which a threat of continuing activity

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[13] A-32.

[14] Fryar's Appendix 56-57.

may be inferred is required. Relying simply on the allegations of the Complaint while ignoring the proof adduced at trial, Fryar argues respondents established only a single limited fraudulent scheme which is insufficient under the most restrictive standard expressed by a court of appeals.

REASONS FOR DENYING THE WRIT

Fryar suggests that the existence of a conflict among the circuits concerning the proper interpretation of the "pattern of racketeering activity" under the RICO statute, requires issuance of a writ of certiorari here, particularly in light of the pendency of *H.J., Inc. v. Northwestern Bell Telephone Company, Inc.*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S.Ct. 1219, 99 L. Ed. 2d 420 (1988) involving this issue. Though a division among the circuits exists on this issue, respondents submit that regardless of the test applied, Fryar's pervasive and related criminal activities spanning a decade would satisfy any of the tests currently employed. Further, Fryar cannot raise this issue for the first time on a petition for writ of certiorari. Hence, this case is inappropriate for review.

1. The Proof Adduced At Trial Satisfies The Most Restrictive Standard Of A "Pattern Of Racketeering Activity".

This Court in *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 105 S.Ct. 3275 (1985) stated that in order for there to be a "pattern of racketeering", a showing of

"continuity plus relationship" must be made. More particularly, the *Sedima* Court stated:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provision in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "This target of [RICO] is thus not sporadic activity. This infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p.158 (1969) (emphasis added).

Id. at 496, n.14 (emphasis in original). Circuit and district courts since *Sedima* have developed varying approaches in determining if the "pattern" requirement has been met. These approaches have been identified as the "liberal" or "expansive view," the "restrictive view" or "narrow view," and the "moderate view" or "middle road view." *See Lawaetz v. Bank of Nova Scotia*, 653 F.Supp. 1278, 1285-86 (D. Virgin Islands 1987).

Although the court of appeals found "the evidence strongly supports the jury's RICO verdict," Fryar petitions this Court for reversal, urging adoption of the narrow view of the "pattern" requiring proof of at least two fraudulent schemes or other factors from which a threat of continuing activity may be inferred.

Even applying the narrow view urged by Fryar, the evidence established proof of a pattern of racketeering activity.

a. Fryar Engaged In At Least Two Distinct Schemes.[15]

Relying solely on the allegations of the Complaint, Fryar argues that respondents' proof consisted merely of a single limited scheme involving the issuance of the Westside bonds. To the contrary, the evidence adduced at trial established that Fryar engaged in numerous schemes other than merely the issuance of the Westside bonds. For example, the record demonstrates that Fryar and Hancock had combined before on other questionable securities offerings which resulted in fines and suspensions for Hancock by the NASD and investigations by the S.E.C. and F.B.I.[16] Similarly, the evidence established that well after issuance of the bonds in this case, Fryar caused the submission of fraudulent cost reports to the State of

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[15] A majority of the court of appeals have rejected the multiple schemes test espoused by Fryar. *United States v. Indelicato*, 865 F.2d 1370, 1383 (2nd Cir. 1989); *Barticheck v. Fidelity Union Bank First National State*, 832 F.2d 36, 39 (3rd Cir. 1987); *Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 192-193 (9th Cir. 1987); *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 31 (1st Cir. 1987); *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154-155 (4th Cir. 1987); *Bank of America National Trust & Savings Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986).

[16] A-35.

Louisiana Medicaid program in order to secure reimbursement for non-existent costs, which reimbursement Fryar pocketed.[17] This fraud, accomplished by virtue of the mails and telephones and embarked upon after commission of the securities offering is a distinct fraudulent scheme under the Eighth Circuit's test.

Likewise, yet another scheme was devised well after Fryar and AA had accomplished the securities fraud. Fryar and AA proceeded to obstruct justice by thwarting plaintiffs' efforts to prosecute this case. Because the relationship between Fryar and AA was a central issue in this litigation, respondents sought to discover information relating to this relationship. All American concealed documents, fabricated documents and threatened a witness into refusing to appear and testify.[18] Apart from the fact that this scheme temporally was distinct, its goal was also different; i.e. to ensure destruction of documents, intimidation of witnesses and generally to preclude discovery of the true facts. Thus, there was ample proof of multiple distinct but related schemes.

b. Respondents Established A Threat Of Continuing Activity.

Under the narrow view espoused by Fryar, proof of factors from which a continuing threat of illegal activity may be inferred also is sufficient to establish a pattern of racketeering activity. A continuing threat exists if the predicate acts are not isolated or sporadic. *Sun Savings &*

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[17] A-36.

[18] A-27.

Loan Ass'n v. Dierdorff, 825 F.2d 187, 193-194 (9th Cir. 1987). For example, in *Dierdorff*, the predicate acts of mail fraud in which the defendant attempted to conceal the receipt of kickbacks occurred on four occasions during a five month period. The Ninth Circuit held that these acts which were not isolated or sporadic events posed a threat of continuing activity. Similarly, where as part of a single scheme, the defendants committed several acts of mail fraud over a period of several years, some of which related to foreclosure sales and some of which related to frauduient statements made in connection with a loan transaction, the continuity requirement was satisfied. *Morgan v. Bank of Waukegan*, 804 F.2d 970, 976 (7th Cir. 1986).

In like manner, the evidence adduced at trial establishes the commission of predicate acts over time that were not isolated or sporadic events, thereby proving a continuing threat of activity. As the court of appeals recognized, Fryar committed numerous acts of mail fraud over time, including the following:[19]

(1) Use of the mails to obtain and transmit the application forms for Westside's certificate of need (1976);

(2) Use of the mails to help create AA and interpose it in the transaction (1981-1982);

(3) Use of the mails to send the land transaction documents to AA (1981-1982);

(4) Use of the mails to transmit sales circulars that erroneously portrayed Fryar as purchasing and pledging $2,000,000 of bonds with his own money (1982); and

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[19] Fryar's Appendix 57.

(5) Use of the mails to cover up the fraud and deceive bondholders into believing AA was performing more obligations than what it had actually undertaken (1982-1983).

There is no better indicator of a pattern of racketeering activity than Fryar's past behavior. Proof of prior illegal acts distinct in time but related in purpose occurring continually over a period of years strongly suggests the probability of future criminal conduct. Indeed, Fryar had been engaged in similar types of activities with the same cast of characters for many years. When persons questioned or attempted to thwart his illegal activities, they were met with a myriad of criminal violations including threats, intimidation and, when all else failed, bribery and obstruction of justice. That there was and is a threat of continuing illegal activity is perhaps best illustrated by the fact that Fryar was indicted and convicted for attempting to bribe two jurors at the trial of this action.[20]

In short, the facts here evince not a single fraudulent scheme but an octopean enterprise that had as its principal purpose the enrichment of Joe Fryar and All American Services.

2. Fryar Never Urged Adoption Of A Multiple Schemes Test Below.

Fryar did not timely urge to the courts below his present contention that multiple schemes are required to

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[20] The opinion is reproduced at A-38.

establish a pattern of racketeering activity. To the contrary, Fryar has consistently argued that proof of the occurrence of two predicate acts motivated by a common scheme or design is sufficient to satisfy the pattern requirement. In his proposed jury instruction regarding "pattern of racketeering activity", Fryar requested that the jury be charged that the plaintiffs must prove the occurence of two predicate acts and that these predicate acts, "rather than being isolated or disconnected occurrences, are part of a pattern of racketeering activity [and that] they [the acts] were motivated by *a* common scheme, plan, or design."[21] Fryar did not seek to instruct the jury that a finding of multiple schemes was required. Fryar objected to the charge given for not having comported with his requested changes which did not require multiple schemes.

Where an appellant fails to specifically object to an instruction he cannot be heard to complain later. Rule 51 F.R.C.P.; *Fischer v. Dallas Federal Savings & Loan Ass'n*, 835 F.2d 567 (5th Cir. 1988); *Pate v. Seaboard R., Inc.*, 819 F.2d 1074 (11th Cir. 1987). Thus, Fryar, who failed to specifically object or to request an instruction requiring multiple schemes, cannot urge this issue. Moreover, Fryar never urged the adoption of the multiple schemes test in his motions for directed verdict, new trial or for J.N.O.V. Rule 50(a) and (b) of the Federal Rules of Civil Procedure requires that a movant on a motion for directed verdict and for J.N.O.V. state the specific grounds for the motion. Failure to state these grounds result in denial of the

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[21] A-28 (emphasis supplied).

motion and elimination of the issue as a basis for appeal. *Clark v. Central States Dredging Co.*, 430 F.2d 63, 65 (8th Cir. 1970); *Arkwright Mutual Ins. Co. v. Philadelphia Electric Co.*, 427 F.2d 1273, 1275 (3rd Cir. 1970).

Fryar also failed to urge this argument in his original brief in the court of appeals. Hence, his suggestion now that the jury was improperly charged or that the correct principal of law was not applied has not been preserved for review.

CONCLUSION

Regardless of the test applied, petitioner Fryar's criminal activities involving mail, wire, welfare, securities and state law frauds spanning a decade satisfy the "pattern of racketeering" requirement of the RICO statute. Contrary to his assertions, Fryar's multifarious criminal activities were the result of several schemes or episodes, resulting in his recent conviction for attempting to subvert the trial of this case by bribing jurors. Surely, there is no better indication of future criminal conduct. Furthermore, Fryar's failure to timely urge this argument to the courts below has not been preserved for review. For these reasons, Fryar's petition for a writ of certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

EDWARD C. ABELL, JR., ET AL

VS.

POTOMAC INSURANCE COMPANY OF ILLINOIS

CIVIL ACTION NUMBER 84-1786

SECTION 0

RULING
(Filed March 26, 1987)

Now before the court are the motions for judgment notwithstanding the verdict and motions for a new trial, filed on behalf of defendants Joe E. Fryar ("Fryar"), All American Services Co., Ltd. ("All American"), Wright, Lindsey & Jennings ("WLJ") and Valley Forge Insurance Company.

On February 4, 1987, after nine weeks of trial, the court excused two jurors, prior to the commencement of jury deliberations, and replaced the jurors with two alternate jurors. In an effort not to prejudice nor to intimidate the jury, the court merely informed the jury that only six jurors were needed to deliberate, and, therefore, that two jurors must be excused. After the replacement, the court informed the attorneys for the parties that the court had replaced two of the jurors with the two alternate jurors because the court had reason to believe that the two excused jurors should have been excused. The court then issued reasons for this ruling, which reasons were filed under seal. That same day, the jury returned a verdict for plaintiffs against all defendants; furthermore, the jury

allocated a percentage of liability to all defendants, including those defendants who had settled prior to trial. The jury found that all defendants had violated Sections 12(1) and 12(2) of the Securities Act of 1933, Sections 10b-5(1) and (3) and 10b-5(2) of the Securities & Exchange Act of 1934, the Louisiana Blue Sky Law, and other state laws. The jury further found that defendants Fryar and All American had violated Sections 1962(a), (b) and (c) of the Racketeer Influenced and Corrupt Organizations ("RICO") Act. The jury awarded damages in excess of $15.8 million.

Defendants have moved for a judgment n.o.v., contending that the proof on certain issues was not sufficient to permit any reasonable juror to find liability. Plaintiffs assert that the judgment entered upon the jury findings is abundantly supported by substantial evidence. In considering a motion for judgment n.o.v., this court may not weigh the evidence; rather, it must determine whether, after considering all the evidence in the light most favorable to the non-moving party, the jury reasonably could have found for the non-moving party. *See Bazile v. Bisso Marine Co., Inc.*, 606 F.2d 101 (5th Cir. 1979), *cert. denied*, 449 U.S. 829, 101 S. Ct. 94 (1980); *Boeing Company v. Shipman*, 411 F.2d 365 (5th Cir. 1969).

Defendants further petition this court for a new trial on the grounds that the jury was not impartial. It is the obligation of this court to set aside the verdict and to grant a new trial only if the court is convinced that the verdict is not supported by the clear weight of the evidence. Thus, the court must accept the jury's verdict if it is one which could reasonably have been reached. *TCP*

Industries, Inc. v. Uniroyal, Inc., 661 F.2d 542, 546 (6th Cir. 1981).

I. Motions for Judgment Notwithstanding the Verdict.

A. 10b-5 Claims.

Defendants first contend that the existence of the prior feasibility study, rendered by the nationally recognized firm of Booz, Allen & Hamilton, Inc. ("Booz, Allen") is not a material fact which the defendants were required to disclose. This assertion is clearly unsupportable. A fact is material if a reasonable person would have attached importance to the fact in determining his course of action. *Huddleston v. Herman & MacLean*, 640 F.2d 534, 543 (5th Cir. 1981). Generally, the jury is responsible for determining whether or not a fact is "material", within the meaning of the securities laws.

The evidence at trial clearly establishes that the Booz, Allen report was a material fact which required disclosure. Plaintiffs Edward Abell and Carey Walton both testified unequivocally that the disclosure of the Booz, Allen report would have changed their investment decision. Furthermore, James Perkins, former president of the National Association of Bond Lawyers, testified that the existence of the prior feasibility study was a material fact which should have been disclosed. *See Securities & Exchange Com'n v. Senex Corporation*, 399 F. Supp. 497 (E.D. Ky. 1975).

Defendants further categorize as immaterial the fact that the purchase price Westside Habilitation Center ("Westside") paid for the Cheneyville property was

highly inflated, thus providing a source of funds to purchase $2 million of bonds, to be pledged to secure Fryar's performance. The uncontested testimony of Perkins, David Menz, a partner of WLJ, and Robert Sheddy, who was also involved in the transaction, established that any fact bearing upon the risk of reimbursement and the ability to generate revenues is material. The evidence further established that Westside's sole source of revenue was the Medicaid program, and that the inflation of the purchase price could lead to disallowance of certain reimbursement claims by the Louisiana Department of Health and Human Resources ("DHHR"). This disallowance would result in a short-fall of at least $300,000 annually. Furthermore, Perkins testified that the inflation of the purchase price was material because it subtantially increased the cost of care and it may have caused consternation within the referring agencies. Maxine Hanks, director of DHHR Rate Administration, and Charles Fine, an integral player in Fryar's transaction, testified that disclosure of the details of the property transaction adversely affected referrals.

Defendants further aver that no reasonable juror could have found that defendants' violations of Rule 10b-5 caused plaintiffs' losses. Rather, defendants submit that the bankruptcy proceeding and the change in DHHR's method of reimbursement were the sole causes of plaintiffs' injuries. To establish causation in a Rule 10b-5 claim, plaintiffs need only show that the omissions and misrepresentations "touched upon" the reasons for the investment's decline in value. Plaintiffs need not establish that the misrepresentations or omissions were the sole, exclusive, or primary cause of the plaintiffs'

losses. *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1162 (5th Cir. 1982), *cert. denied*, 460 U.S. 1013, 103 S. Ct. 1254 (1983). Plaintiffs clearly established the requisite causation between defendants' violations and plaintiffs' injuries. Charles Fine, Fryar's witness, conceded on cross-examination that disclosure of the true details of the property transaction resulted in DHHR imposing a freeze on referrals, which freeze resulted in Westside's inability to generate sufficient revenues to pay its debts. Mr. Baxley, also Fryar's witness, corroborated this testimony. Furthermore, defendants' claim that the failure of the Penn Square Bank caused delays and loss of money to the project that resulted in the Westside bankruptcy proceedings is unfounded. The facility was completed on schedule, and Westside lost at most only $300,000 as a result of the Penn Square Bank failure, a sum less than the interest paid to All American on the $2 million in bonds it received, for which it paid nothing.

WLJ argues that there was no evidence from which a jury could conclude that it acted with the requisite scienter to have violated Rule 10b-5. WLJ's claim, however, ignores the well-established trend that a defendant who acts with severe recklessness satisfies the scienter requirement. *Broad v. Rockwell Intern. Corp.*, 642 F.2d 929, 961 (5th Cir. 1981), *cert. denied*, 454 U.S. 965, 102 S. Ct. 506 (1981); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 544 (5th Cir. 1981). Plaintiffs have established that WLJ acted with severe recklessness by proving that WLJ showed "an extreme departure from the standards of ordinary care." *Broad v. Rockwell Intern. Corp.*, 642 F.2d at 961-62. Perkins testified that underwriters' counsel, such as WLJ, has the obligation to perform a due diligence investigation,

wherein counsel would ensure that the offering documents adequately disclose all material facts. Moreover, Perkins testified that it is the responsibility of underwriters' counsel to question all participants in the transaction, including the developer and the feasibility consultant, in order to ensure that all material facts have been disclosed. More importantly, Perkins testified that underwriters' counsel cannot rely upon information provided by his or her client, the underwriters, because the underwriters may conceal facts which, if disclosed, might hinder the sale of the bonds. It is clear that the withdrawal of other law firms, such as the illustrious New York firm of Mudge, Rose, and the failure of the transaction to be approved by the State Bond Commission, required heightened due diligence on the part of WLJ. Moreover, it is spurious for WLJ to claim as a defense to its negligence the fact that it began to represent the underwriters late in the proceedings.

WLJ's performance clearly constituted severe recklessness and a departure from the standards of ordinary care. WLJ did not personally question anyone about the transaction, other than the underwriter, Hancock, who was aware the transaction was the subject of an investigation by the Securities & Exchange Commission, the National Association of Securities Dealers, and the Federal Bureau of Investigation. Neither Menz nor anyone from WLJ questioned Fryar, the feasibility consultant, Westside's board of directors, the management company, Westside's accountant, the director of Rate Administration, or All American. Moreover, Menz did not even review the Booz, Allen report. Nevertheless, Menz prepared, reviewed, and revised offering documents, such as

the Summary Memorandum and the Preliminary Official Statement.

Defendants further contend that because plaintiffs Abell and Walton did not themselves read the Official Statement prior to their purchase of the bonds, the requisite element of reliance in a Rule 10(b)-5 claim was not established, and that, therefore, the plaintiffs cannot recover under either Section 10(b) or Rule 10b-5. This assertion is specious and is unfounded in the law. The law is clear that, to establish a claim under Rule 10b-5(2), alleging primarily a failure to disclose, the plaintiffs need only prove that an omission of material fact, made with scienter, contributed to their injury. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 92 S. Ct. 1456 (1972), *reh. denied*, 407 U.S. 916, 92 S. Ct. 2430 (1972) and *reh. denied*, 408 U.S. 931, 92 S. Ct. 2478 (1972); *Shores v. Sklar*, 647 F.2d 462, 468 (5th Cir. 1981), *cert. denied*, 459 U.S. 1102, 103 S. Ct. 722 (1983); *Huddleston v. Herman & MacLean*, 640 F.2d at 543; *Croy v. Campbell*, 624 F.2d 709, 715 (5th Cir. 1980); *Cameron v. Outdoor Resorts of America, Inc.*, 608 F.2d 187, 193-94 (5th Cir. 1979), *aff'd in part, vacated and remanded on rehearing*, 611 F.2d 105 (5th Cir. 1980); *Dupuy v. Dupuy*, 551 F.2d 1005, 1014 (5th Cir. 1977), *cert. denied*, 434 U.S. 911, 98 S. Ct. 312 (1977). Moreover, in an omission action, such as this case, reliance is presumed, upon a showing that the withheld facts were material. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. at 153-54, 92 S. Ct. 1472. Moreover, even though plaintiffs did not actually read the Official Statement, they read and they relied upon a written sales circular describing the offering which omitted material facts. Walton himself testified that it was specifically represented to him that

the project was feasible and that the developer had $2 million of his own at risk. Moreover, plaintiffs clearly proved secondary reliance on the sales circular and oral representations by defendants. Notwithstanding that each investor may not have read the Official Statement, the brokers who advised these investors did read and did rely upon the Official Statement. Mr. Sheddy and Robert Crayne, a former Swink broker, corroborated this conclusion. *See Frankel v. Wyllie & Thornhill, Inc.*, 537 F. Supp. 730 (W.D. Va. 1982).

Defendants argue that plaintiffs cannot recover on a fraud on the market theory because they failed to establish that the bonds were worthless and that the bonds were traded on a public market. This assertion is entirely without merit. Contrary to defendants' contention, to prove a party violated Rule 10b-5(1) and (3), plaintiff need only show that the party: (1) employed a device, scheme, or artifice to defraud, or engaged in a course of business that operates as a fraud; (2) with scienter; (3) upon which the plaintiff relied; and (4) that caused an injury. *Shores v. Sklar*, 647 F.2d at 469; *Kennedy v. Tallant*, 710 F.2d 711 (11th Cir. 1983). Thus, defendants' assertion of a worthless requirement in a Rule 10b-5 claim is unfounded.

B. Section 12 Claims and Louisiana Blue Sky Law.

Defendants contend that the bonds were exempt from registration with the Securities & Exchange Commission and the Louisiana Securities Commission because Westside, the issuer, is a non-profit organization. This assertion is obviously specious. The mere non-profit

status of an entity does not assure entitlement to the exemption. Rather, the exemption will be held inapplicable where a substantial purpose of the organization of the entity is to enrich the promoters by providing them with large profits for the enterprise. *Securities and Exchange Com'n v. Children's Hospital,* 214 F. Supp. 883, 888-89 (D. Ariz. 1963). The jury could reasonably conclude from the evidence presented at trial that a substantial purpose of the organization of Westside was to enrich Fryar and All American by providing them with large profits. Fryar himself testified that he had pecuniary motives in becoming involved in the transaction. Furthermore, All American received in excess of $700,000 in interest payments, for which it had performed absolutely no services. The evidence presented by defendants to prove All American's obligations on behalf of Joe Fryar, in consideration for receiving $2,459,000 for a piece of property that cost it only $150,000, was a letter from All American which mysteriously appeared during the course of the trial. The letter was dated November, 1981, wherein All American agreed to buy the property which it had already purchased in August, 1981. Moreover, defendants relied upon a copy of a resolution of All American, delineating All American's obligations. Defendants could not find the original of the resolution, and, strangely enough, the document was not produced at plaintiffs' request during discovery. This resolution is quite puzzling in view of the fact that Chambers, who was President of All American, testified by deposition prior to his death that the only obligation that All American owed to Fryar was to pledge the $2 million in bonds to Westside's trustee, to secure Fryar's obligation.

WLJ also argues that the exemption from registration for "transactions by any person other than an issuer, underwriter, or dealer" is applicable. 15 U.S.C. § 77d(l). This argument is belied by case law. The exemption is not available to any participant in a transaction in which the issuer, underwriter, or dealer is offering or selling securities. *Securities & Exch. Com'n v. Murphy*, 626 F.2d 633 (9th Cir. 1980); *Securities & Exchange Commission v. Chinese Consol. Benev. Ass'n Inc.*, 120 F.2d 738, 741 (2d Cir. 1941). WLJ clearly was a participant in such a transaction.

WLJ further argues for the first time that attorneys are exempt from the Louisiana Blue Sky Law. Because WLJ neither asserted this argument in its pleadings nor in the pre-trial order, WLJ cannot raise the issue for the first time after trial via post-trial motions. *See Flannery v. Carroll*, 676 F.2d 126 (5th Cir. 1982); *Adams v. Thompson*, 560 F. Supp. 894 (M.D. La. 1983). Be this as it may, WLJ's contention is unsupportable. The Louisiana Blue Sky Law is analogous to the Securities Act of 1933. Federal courts have construed the term "seller", within the meaning of the Securities Act of 1933, to include those parties who are a substantial factor in causing the transaction to occur. This analysis provides guidance to courts which are construing the Louisiana Blue Sky Law. See *Ek v. Nationwide Candy Division, Ltd.*, 403 So.2d 780, 785 (La.App. 3rd Cir. 1981).

Defendants aver that they cannot be held liable for violations of Section 12 because they were not sellers of the bonds. This argument defies logic. The law is clear that "seller", within the meaning of Section 12(2), is not required to be in strict privity with the purchasers.

Rather, a party may qualify as a "seller" if it is a "substantial factor" in causing the transaction to occur. *Junker v. Crory*, 650 F.2d 1349 (5th Cir. 1981); *Pharo v. Smith*, 621 F.2d 656 (5th Cir. 1980). Thus, courts have held promoters of a venture and attorneys to be liable as sellers, within the meaning of Section 12(2). *See Hill York Corporation v. American International Franchises, Inc.*, 448 F.2d 680, 693 (5th Cir. 1971); *Excalibur Oil Inc. v. Sullivan*, 616 F. Supp. 458 (N.D. Ill. 1985).

The evidence presented at trial clearly establishes that all of the defendants were sellers, within the meaning of Section 12(2). Fryar was the mastermind behind the Westside transaction. Sheddy testified that Fryar not only fomented the project, Fryar was the organizer and the financier of the project. Sheddy further testified that, but for Fryar's involvement, the bonds would have not been issued. Menz corroborated this testimony by commenting that he believed that Fryar's role in the project was substantial. Mr. Kendrick testified that Fryar, rather than the Board of Directors, made the decisions for the project.

Further evidence was produced at trial which clearly supported the jury's finding that WLJ and All American were "sellers", within the meaning of Section 12(2). Sheddy testified that, but for the role WLJ as underwriters' counsel played, the bonds would not have been issued. Sheddy further testified that the underwriters relied upon WLJ to ensure that adequate disclosure had been made in offering the documents, which documents had been prepared and/or reviewed by WLJ. Perkins testified that, in a bond offering, underwriters' counsel plays a substantial role. Perkins corroborated Sheddy's

testimony that, but for the role WLJ played in the transaction, the bonds would not have been issued.

All American's role in the transaction clearly constituted that of a "seller", within the meaning of Section 12(2). Fryar himself testified that, but for All American's role, he would not have proceeded with the transaction. Indeed, All American's role was integral to the transaction, despite the clearly established fact that All American's only obligation in the entire transaction was to pledge the $2 million in bonds to secure Fryar's obligation. Had All American not pledged these bonds, Fryar's machinations would not have transpired.

Defendants assert that plaintiffs have somehow abandoned their Section 12 claims and that, therefore, the remedy of recission is not available to them. This assertion is incorrect. Plaintiffs' pre-trial order, plaintiffs' proposed jury instructions, and the court's jury instructions all reflect plaintiffs' entitlement to the remedy of recission. Indeed, recission is the only remedy afforded a litigant under Section 12. 15 U.S.C. § 771. Moreover, once a defendant is held to be liable as a seller under Section 12, he is subject to the recission remedy, even though he may not be the direct seller. *Hill York Corporation v. American International Franchises, Inc.*, 448 F.2d 680 (5th Cir. 1971).

C. Louisiana Blue Sky Law.

Fryar contends that plaintiffs cannot recover under the Louisiana Blue Sky Law because they failed to prove knowledge of a misrepresentation and reliance on the misrepresentation. Fryar's assertion is completely

unfounded. Under the Louisiana Blue Sky Law, as under Section 12(1) of the Securities Act of 1933, reliance is not an element of a claim for failure to register the security with the Louisiana Securities Commission. Moreover, proof of reliance is not a prerequisite for a violation of LSA-R.S. 51:712A(2). *See Caldwell v. Trans-Gulf Petroleum Corp.*, 322 So.2d 171 (La. 1975); *Securities & Exchange Com'n v. Southwest Coal & Energy Company*, 624 F.2d 1312 (5th Cir. 1980); *Larson v. Tony's Investment, Inc.*, [1967-1969 Transfer Binder] Fed. Sec. L. Rep. [CCH] ¶92,324 at 97,532 (M.D. Ala. 1968) (that plaintiff did not see a prospectus before purchasing shares is not fatal to a Section 12(2) claim).

D. Burden of Proof Under Louisiana Law.

Fryar contends that La. Civ. Code art. 1957 is inapplicable to the present case. That article states:

> Fraud need only be proved by a preponderance of the evidence and may be established by circumstantial evidence.

LSA-C.C. art. 1957.

Fryar's disavowance of article 1957 is devoid of merit, and he offers no authority to support this proposition. Contrary to Fryar's assertion, article 1957 does not change the law. Rather, it restates a principle expressed more than one hundred years ago, in LSA-C.C. art. 1848 (1870).

E. RICO Claims.

Fryar argues that plaintiffs' RICO claims are unsupportable because the plaintiffs have failed to prove a scheme or an artifice to defraud on the part of defendants. In order to establish a scheme or an artifice to defraud, within the meaning of the wire fraud statutes, plaintiffs need only prove the existence of any plan intended to deceive others, and to obtain money or property from persons so deceived, by false or fraudulent pretenses, representations or promises.

Substantial evidence was adduced at trial from which a reasonable jury could infer the existence of a scheme or artifice to defraud. It is obvious that Fryar caused All American to be organized for the express purpose of concealing that a profit in excess of $2 million was to be made on the sale of the Cheneyville property. Fryar was the only party in contact with All American, and it was Fryar who caused the documents necessary to effectuate the scheme to be mailed to All American and to other parties involved in the transaction.

The evidence at trial abundantly supported the jury's finding that Fryar violated Section 1962(a) of the RICO Act. It is clear that Fryar and All American derived in excess of $2 million from the pattern of racketeering activity which resulted from the issuance of the Westside bonds. It is also well established that at least $2.4 million of the racketeering monies was used by Fryar and All American to acquire an interest in Westside by the purchase of Westside bonds, and that at least part of the proceeds of that investment, the interest payments, were paid to Fryar, who was operating Westside.

The evidence adduced at trial also supports the reasonableness of the jury's finding that Fryar and All American violated Section 1962(b) of the RICO Act. Fryar and All American used the racketeering monies to acquire over $2 million of Westside bonds. As a result of the scheme, Fryar controlled and operated Westside, during which time he received all revenues paid by the state of Louisiana to Westside, including revenues paid as reimbursement for the interest owed by Westside to plaintiffs. Nevertheless, Fryar refused to pay this interest to plaintiffs. Moreover, the fact that Westside failed to make demand upon Fryar for return of the revenues further indicates that Fryar controlled Westside.

The evidence also abundantly supports the jury's finding that Fryar and All American violated Section 1962(c) of the RICO Act. The evidence discussed above clearly indicates that Fryar and All American participated in the scheme to issue and to market the Westside bonds, within the meaning of Section 1962(c).

F. Conspiracy or Scheme to Defraud.

Fryar avers that plaintiffs have failed to establish the existence of a conspiracy or a scheme to defraud. This contention is entirely devoid of merit. The evidence adduced at trial clearly established that Fryar fomented and directed the Westside project, and that Fryar, not the board of directors, actually made all important decisions for Westside. But for Fryar's integral involvement, the bonds would not have been marketed. Fryar caused the organization and the incorporation of Westside, the vehicle for accomplishing the scheme. At the time of its

incorporation in 1979, Westside had no capital assets. Rather, its only source of revenue and assets were to be derived through the bond issuance and revenues paid thereafter by the State of Louisiana Medicaid program.

Fryar protected, as it were, his fraudulent scheme by threatening the nationally astute Booz, Allen firm with suit, because of Booz, Allen's adverse conclusions with respect to the feasibility of the Westside project. Fryar then retained Real Estate Research Corporation ("RERC"), a firm with little, if any, familiarity with or knowledge of Louisiana regulations governing reimbursement under the Medicaid programs. Fryar remained undaunted by the subsequent refusal of the Louisiana State Bond Commission to grant approval for the bond issuance, which refusal was generated by questions regarding the principals involved, the amount of profit anticipated to inure to the principals, and opposition to the project by officials of the Louisiana Department of Health and Human Resources. Fryar purchased the Cheneyville property for $100,000. To conceal the fraud, Fryar sold the property for $150,000 in late 1981 to All American, a Bermuda corporation organized to assist Fryar in the transaction. The funds for All American's purchase were obtained from Fryar's underwriting account in a related Bermuda company.

Fryar fomented more fraud to assure the success of his scheme. To secure performance of his obligations as developer under the Development Agreement, Fryar agreed to purchase and to pledge bonds in an aggregate principal amount of $2 million. Fryar thus appeared to have $2 million of his *own* funds at risk, as security for the performance of his obligations, an appearance he

expressly included in the Summary Memoranda, the "Red Herring", and other sales circulars which were distributed to potential investors.

Fryar then grossly inflated the price to be paid by Westside so that over $2 million would be realized from the bond proceeds, which profit would be used to purchase the $2 million of bonds Fryar was required to pledge as security. Structuring the transaction in this manner relieved Fryar of the obligation to put his own funds at risk to secure his performance. It also enabled Fryar and All American to receive a substantial additional profit in the form of the bonds. Fryar's and All American's assertions that the payment to All American of $2,459,000 was payment for All American's assumption of Fryar's obligations pursuant to the Development Agreement is completely belied by the evidence adduced at trial. As was indicated above, these pseudo-obligations on the part of All American were set forth in a copy of a resolution, with no available original, which resolution was not produced during discovery and which mysteriously appeared during the course of the trial.

Fryar's sale of the bonds was permeated with fraud. The Official Statement, sales circulars, and oral representations made to offerees and investors omitted material facts, including, among other things, the omission that Fryar purchased the Cheneyville property for $2 million less than Westside paid for the same property. Moreover, Fryar omitted to disclose the material facts that a feasibility study conducted by the nationally recognized firm of Booz, Allen rendered adverse results, and that Westside most likely was unable to service its debt or to make interest payments to bond purchasers.

G. Aiding and Abetting.

Fryar contends that proof of a conspiracy is necessary to establish liability as an aider or abettor under the federal securities laws. This contention is completely unsupported by the law. The law is clear that to establish that a defendant aided or abetted a violation of the federal securities laws, plaintiffs need only prove: (1) the existence of a federal securities law violation; (2) that the aider or abettor had knowledge of the act; and (3) that the aider or abettor knowingly and substantially participated in the wrongdoing. *See Woodward v. Metro Bank of Dallas*, 522 F.2d 84 (5th Cir. 1975).

H. Statute of Limitations Defense.

Pursuant to an agreement of all the parties, the issue of WLJ's and All American's statute of limitations defense has been decided by the court in a written ruling. The court adamantly maintains its reasoning in this ruling, and, therefore, the court will not readdress this issue.

I. Damages.

Defendants argue that the court erroneously applied the benefit of the bargain measure of damages to the case. Contrary to defendants' assertions, the court never indicated that the only proper measure of damages for state securities violations is the out-of-pocket measure. Rather, the court merely indicated that the out-of-pocket measure of damages is appropriate for federal securities violations. *Huddleston v. Herman & MacLean*, 640 F.2d at 534. However, under Section 12 and under the Louisiana Blue

Sky Law, the remedy of recission is mandatory. That is, Section 12(2) explicitly disallows the plaintiff a choice of remedy. If the plaintiff owns the stock, he is entitled to recission, and not to damages. In contrast, if plaintiff no longer owns the stock, he is entitled to damages, and not to recission. *Wigand v. Flo-Tek Inc.*, 609 F.2d 1028, 1035 (2d Cir. 1979). A plaintiff who no longer owns the security is entitled to damages which would put the plaintiff in the same position as the position in which a plaintiff who still owns the security would be; that is, the plaintiff who no longer owns the security is entitled to recover the amount paid for his or her securities, plus interest thereon from the date of payment to the date of repayment, at the same rates as were originally provided for in the bonds. *Randall v. Loftsgaarden*, ___ U.S. ___, 106 S. Ct. 3143, 3149 (1986).

Defendants also argue that plaintiffs failed to establish the amount of damages. This contention lacks merit. The uncontroverted testimony of plaintiffs' experts, Messrs. Gordon and Derbes, established the amount of damages to which plaintiffs were entitled. Defendants offered no evidence to refute this testimony.

Defendants further contend that plaintiffs failed to produce evidence with respect to damages as to each and every class member. This contention is belied by the fact that the calculations by plaintiffs' expert Derbes were based upon the actual number of bonds, varying interest rates, and amounts paid to date. Plaintiffs also introduced into evidence questionnaires prepared by members of the class, which questionnaires established the date of the purchase. Derbes' testimony was based upon his review of the questionnaires. Gordon testified that the

actual value of the bonds was $1,850 less than par, regardless of the plaintiffs' date of purchase.

Fryar further argues that plaintiffs are not entitled to a damage award of $1,540,000 for breach of fiduciary duty and for violations of article 2315 of the Louisiana Civil Code, because some of plaintiffs still own the bonds. This contention is untenable, and Fryar does not buttress the contention with any compelling authority.

Defendant WLJ argues for the first time that plaintiffs are not entitled to recover because they failed to tender their bonds. This contention is spurious. The law is clear that tender of a security is required only where the recission remedy is applied. *See Wigand v. Flo-Tek, Inc.*, 609 F.2d at 1035. Because the court did not apply the recission remedy, tender is not required. Notwithstanding this fact, actual physical tender is not required. Rather, plaintiffs may tender their bonds in the complaint. *Wigland v. Flo-Tek, Inc.*, 609 F.2d at 1034. Plaintiffs in this case expressly tendered their bonds in paragraph 39 of the complaint.

WLJ further asserts that plaintiffs who are unable to tender cannot recover. This contention directly contradicts the well-established axiom that plaintiffs who no longer own the bonds are entitled to be placed in the same position as those plaintiffs who have tendered their bonds. *See Randall v. Loftsgaarden*, ___ U.S. ___, 106 S. Ct. at 1343.

WLJ also suggests that any damage award to plaintiffs must be reduced by the value of the security held by the plaintiffs. This assertion directly contradicts the benefit of the bargain damage theory. *See Harris v. Union*

Electric Company, 787 F.2d 355, 371 (8th Cir. 1986); *Levine v. Futransky*, 636 F. Supp. 899 (N.D. Ill. 1986).

II. Motions for a New Trial.

On February 4, 1987, prior to deliberation of the case by the jury, the court informed counsel in chambers that probable cause to excuse two jurors existed. Because one of the discharged jurors may have been contacted by an outside source and may have revealed the information to one or more of the jurors who deliberated, the court decided that the jurors should be questioned, but only after the verdict was returned, to determine if any contact had been made and, if so, if the contact had been prejudicial to any party. *See Remmer v. United States*, 347 U.S. 227 (1955); *United States v. Forrest*, 620 F.2d 446, 458 (5th Cir. 1980); *Port Terminal & Warehousing v. John S. James Co.*, 92 F.R.D. 100, 105 (S.D. Ga. 1981).

The jurors were questioned in the presence of counsel, and all denied that, prior to their deliberations, they discussed with any other juror, or overheard any other juror discuss, whether anyone had influenced or had attempted to influence any juror's opinion as to the liability or non-liability of any defendant. The court then discharged the jury in the care of the U. S. Marshal for further questioning by the U. S. Attorney.

After questioning the jurors, including the two jurors who did not deliberate, the U. S. Attorney informed the court that five of the six jurors who deliberated had admitted that they either had been told by discharged juror Kent Terracina or had seen a note passed by him to another juror that he had been offered $10,000 by Fryar to

vote in favor of Fryar. The court then requestioned the jurors in the presence of counsel. Their testimony has been sealed, but nevertheless has been made available to all counsel.

The jurors gave the following explanation for not admitting to the court their knowledge of the outside contact. Five of the six jurors advised the court that Juror Terracina was sort of "weird" and "off the wall." They did not believe his story and thought that it was a joke. In fact, some of the jurors continue to disbelieve it. In short, the jurors did not feel that these facts were important enough to be brought to the court's attention and they did not want to make any accusations against anyone based on this type of information. Some jurors were also concerned about a mistrial, after having invested two months of their time in this case. Thus, the jurors agreed among themselves not to relate this information to the court.

The court then questioned the jurors to determine if any prejudice had resulted to the defendant Joe Fryar or any other party as a result of the information revealed by Juror Terracina. Every juror replied that no prejudice had occurred and that the verdict would have been the same "to the penny" had they not been informed about the outside influence. The court believes in the veracity of the jurors, and is firmly convinced that no prejudice occurred.

If there was an attempt to tamper with the jury in this case, it was for the benefit of Joe Fryar alone. There is not a scintilla of evidence to suggest that any other defendant could have been prejudiced. As to Joe Fryar,

the court is of the opinion that there was no prejudice to him. First, some of the jurors did not believe that an attempt was made to tamper because they did not believe Terracina. Second, the court had an opportunity to personally question the jurors, and the court is convinced that no prejudice as to any party tainted the jury's deliberations. Third, the court is of the firm opinion that the verdict is, without dispute, completely supported by the evidence. Defenses advanced by the defendants in this case that may have appeared to have had some relevance at the beginning of the trial have completely vanished. Fryar structured the transactions merely to conceal the fraud. For instance, the defendants' claim that the failure of the Penn Square Bank caused delays and loss of money to the project that resulted in the Westside bankruptcy proceedings is unfounded. The facility was completed on schedule and Westside lost at most $300,000 as a result of the Penn Square Bank failure, a sum less than the interest paid to All American Services Co., Ltd. on the $2 million in bonds it received, for which it paid nothing. The in-use valuation on the facility, advanced by defendants, is totally irrelevant, in light of the fact that the state of Louisiana makes reimbursements, the sole source of revenues for Westside, on appraisals based only on market value.

Moreover, as the court discussed above, evidence presented by defendants to prove All American's obligations on behalf of Joe Fryar in consideration for All American's receipt of $2,459,000 for a piece of property that cost it $150,000, was a letter from All American Services Co., Ltd., which letter mysteriously appeared,

dated November, 1981, agreeing in part to buy the property *which it had already purchased in August of 1981.* Another document relied upon by defendant Fryar was a copy of a resolution of All American Services Co., Ltd. setting forth All American's obligations. No original of this document could be found and the document was not produced when plaintiffs' first demanded it during discovery. This document is very strange in view of the fact that Mr. Chambers, who was President of All American, testified by deposition prior to his death that the only obligation that All American owed to Joe Fryar was to pledge the $2 million in bonds to the trustee for Westside to secure Fryar's obligation.

It is also clear that no prejudice tainted the amount of damages awarded by the jury. To indulge in a little speculation and conjecture, the court will address the question of whether or not any of the jurors who deliberated were approached by Fryar, had failed to reveal the contact to the court, had overreacted in favor of the plaintiffs, and had returned an award of damages in excess of what would have been awarded had there been no contact. The evidence clearly shows that if any prejudice of this sort developed during the trial, it completely dissipated by deliberation day.

The jury awarded $9,594,000 in special interrogatory number 13, the "benefit of the bargain" damage interrogatory. This award is clearly supported by the evidence and is far less than the jury could have awarded, considering that the plaintiff bondholders lost $3,402,146 in past interest payments and also lost $8,638,000, the present value of the money that plaintiffs will lose in the future, due to the reduction of interest payments from 16.5% to

10.45%, for the remaining life of the bonds. These losses are reasonably certain to occur, since no monies have been placed in the missed-interest fund as of the date of the conclusion of the trial. The defendants have not provided the court with any authority that would compel, or even permit, the court to exercise its discretion and to refuse to enter a judgment for the amount awarded in special interrogatory number 13.

Furthermore, the jury's award of damages did not award plaintiffs double recovery. The award against all defendants rendered in special interrogatory number 14, for $2.2 million to compensate the plaintiffs for negligent or intentional misrepresentations or omissions and/or for breach of fiduciary duty, is encompassed in the award made in special interrogatory number 13. The malpractice award against Wright, Lindsey & Jennings and its insurer, Valley Forge Insurance Company, in special interrogatory number 21 in the amount of $300,000 is also encompassed within the award entered in special interrogatory number 13. In constructing the interrogatories, the court and the parties were aware that overlapping awards could be made and that the court would formulate a judgment to avoid double recoveries. Further, the jury was also instructed along these lines. At page 89 of the jury charge the court instructed the jury as follows:

> As you can see from the interrogatories that I have given you, several questions have been asked concerning damages under different statutes and different theories of recovery. First, you should not draw any inference from the fact that a damage interrogatory has been asked. Secondly, you are to answer each interrogatory separately and award damages, if appropriate, independent of damages which you may

award under another interrogatory. Upon your completion of the interrogatories, the court will then decide which awards, if made, will actually be awarded to the plaintiffs.

A review of the record with regard to liability and damages convinces the court that the damages represent a fair verdict which is abundantly supported by the evidence and is untainted by prejudice or favor to any party.

IV. Conclusion.

The evidence adduced at trial convinces this court beyond any doubt that the jury's verdict is reasonable. Indeed, it defies logic to suggest that, given the evidence, the verdict is not completely meritorious.

Accordingly, the motions by Joe E. Fryar, All American Services Co., Ltd., Wright, Lindsey & Jennings, and Valley Forge Insurance Company for judgments notwithstanding the verdict and for a new trial are hereby DENIED.

Opelousas, Louisiana, March 26, 1986.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

TO MAX RE: FLEMING

THE TRIAL IS A CIVIL ACTION AND OCCURS ON DECEMBER 1, 1086. IT IS NOT CRIMINAL – FLEMING DOES NOT HAVE TO TESTIFY AND SHOULD NOT.

FLEMING SHOULD RESIST BEING DEPOSED. HARGAN IS ACQUAINTED WITH THE CASE AND SHOULD REPRESENT HIM. THE FOLLOWING POINTS ARE MADE:

1. A.A. IS AN EXEMPT COMPANY AND SHOULD BE PROTECTED BY BERMUDA'S SECRECY LAWS.

2. FLEMING HAS A DUTY AND OBLIGATION OF CONFIDENTIALITY REGARDING HIS CLIENTS BUSINESS AND RECORDS.

3. FLEMING HAS NO RIGHT TO POSSESS ANY ORIGINALS, COPIES, CORRESPONDENCE, RECORDS OR RECOLLECTIONS PERTAINING TO A.A. AND SHOULD IMMEDIATELY SURRENDER ANY THAT HE HAS TO THE COMPANY AND FORGET ANYTHING THAT HE RECALLS.

4. TESTIMONY RELATIVE TO FUNDING A.A. VIA ANGLO AND FRYAR'S INVOLVEMENT WITH ANGLO WOULD BE VERY DAMAGING TO A.A.'S EFFORTS TO RECOVER THE BONDS.

5. ANY LOSS THAT A.A. SUFFERS BECAUSE OF FLEMING'S RECORDS, TESTIMONY OR VIOLATING THE CONFIDENTIALITY OF A.A.'S BUSINESS WILL CAUSE A.A. TO SEEK ECONOMIC RECOVERY VIA LEGAL ACTION AGAINST FLEMING.

6. IF HE AVOIDS BEING DEPOSED OR UPON BEING DEPOSED, RESPECTS THE CONFIDENTIAL RELATIONSHIP BETWEEN HIMSELF AND A.A., THEN HE CAN EXPECT TO RETAIN A GOOD AND GENEROUS CLIENT. BUT IF HE

DIVULGES OUR BUSINESS, THEN IT WILL BE INCUMBENT ON A.A. THRU THE COURTS TO LET HIS PRESENT AND FUTURE CLIENTS KNOW THE LOOSENESS WITH WHICH THEIR BUSINESS DEALINGS ARE HANDELED. THIS WILL HARDLY INSPIRE CONFIDENCE IN CLIENTS OF FLEMING.

J. H. SMITHERS

Excerpt from Fryar's proposed jury instructions

JOE E. FRYAR'S PROPOSED
JURY INSTRUCTION NO. 15

"PATTERN"

The plaintiffs must show a pattern of racketeering activity. It is not enough for them to prove that Fryar committed two of the alleged acts of wire fraud, mail fraud, or securities fraud. They must also prove that these acts, rather than being isolated or disconnected occurrences, are part of a pattern of racketeering activity. Even if you find that Fryar committed two of the unlawful acts alleged, you must be convinced that those acts were part of a pattern and that they were motivated by a common scheme, plan, or design. If you cannot conclude or are not convinced by a preponderance of the evidence that Fryar committed the acts of mail fraud, wire fraud, or securities fraud as alleged, then you cannot find that a pattern of racketeering activity has been proven.

AUTHORITY:

R.A.G.S. v. Couture, 774 F.2d 1350 (5th Cir. 1985).

Excerpt from Fryar's Motion for Judgment Notwithstanding the Verdict

VII. THE PLAINTIFFS' CLAIMS, BASED ON AN ALLEGED VIOLATION OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO"), MUST FAIL BECAUSE THE PLAINTIFFS HAVE FAILED TO PROVE ALL THE ELEMENTS OF A CAUSE OF ACTION BASED ON THIS STATUTE

The complaint filed by the Plaintiffs in the instant action alleged, inter alia, that Fryar is liable to them because of violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") 18 *U.S.C.* §§ 1961-1968 (West 1985 & Supp. 1986). The Plaintiffs' substantive RICO claim must fail, however, because the Plaintiffs have failed to meet their burden of establishing all of the elements of a cause of action based on a violation of that statute. In particular, the Plaintiffs have completely failed to demonstrate that Fryar committed the predicate acts required to establish liability under RICO.

In order to prove a substantive RICO violation under 18 *U.S.C.* § 1962(c), a plaintiff must prove each of the following elements: (1) the existence of an "enterprise" which affects interstate or foreign commerce; (2) that the defendant was "associated with" the enterprise; (3) that the defendant participated in the conduct of the enterprise's affairs; and (4) that the participation was through a "pattern of racketeering activity" which the statute defines as the commission of *at least two predicate acts* as designated in 18 *U.S.C.* § 1961(1), including mail fraud, wire fraud and securities fraud, *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981).

The gravamen of the Plaintiffs' RICO claim is that Fryar committed securities fraud, mail fraud, and wire fraud in connection with the sale of the securities on the Westside Project. If the Plaintiffs could have demonstrated that Fryar had, in fact, committed at least two acts of securities fraud or mail fraud or wire fraud, or some combination of these three, within a ten-year period, then they would have satisfied this essential element of their claim. The proof, however, simply did not support the Plaintiffs' position. As noted throughout this litigation, the securities law violations which the Plaintiffs alleged in their complaint are completely without substance. Moreover, even a cursory examination of the law related to mail fraud and wire fraud in light of the record before this Court must produce the identical conclusion with respect to the mail fraud and wire fraud allegations – viz., the Plaintiffs have simply failed to establish the necessary elements of a violation of the mail fraud and wire fraud statutes.

The courts in the Fifth Circuit and elsewhere have uniformly held that in order to establish mail or wire fraud under 18 *U.S.C.* § 1341 and § 1343, the government or a private RICO plaintiff must prove three specific elements: (1) the defendant participated in *some scheme or artifice to defraud;* (2) the defendant or someone associated with the scheme used the mails, and (3) the use of the mails was for the purpose of executing the scheme. *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475 (5th Cir. 1986); *United States v. Davis*, 752 F.2d 963 (5th Cir. 1985); *United States v. Taylor*, 789 F.2d 618 (8th Cir. 1986) (government must prove beyond a reasonable doubt that defendant devised an intentionally fraudulent scheme);

United States v. Lemire, 720 F.2d 1327 (D.C. 1983) (scheme to defraud is an element of both wire fraud and mail fraud).

While the mail fraud and wire fraud statutes have been somewhat broadly construed in the Fifth Circuit to encompass any conduct "which fails to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of the members of society," *United States v. Curry*, 681 F.2d 406 (5th Cir. 1982) (quoting *Blackly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967)), a fair review of the record presently before this court reveals no indication that Fryar engaged in any "scheme or artifice to defraud," no matter how broadly those terms are construed. Therefore, since the Plaintiffs have failed to carry their burden of proof on at least one essential element of a violation of the mail fraud and wire fraud statutes – viz., that Fryar engaged in a scheme to defraud the defendants – it follows that neither mail fraud nor wire fraud can serve as the predicate acts required under RICO.

In conclusion, it is clear that in failing to establish that Fryar committed securities fraud, mail fraud, or wire fraud, the Plaintiffs have not proven that Fryar committed at least two predicate acts within a ten-year period. Therefore, since proof of such conduct is an essential element of a RICO cause of action, *United States v. Elliott*, *supra*, it follows that the Plaintiffs' claim based on a violation of that statute must fail as a matter of law.

Excerpt from Fryar's Fifth Circuit brief

(6) As a matter of law plaintiffs are entitled to recover nothing under their RICO claim.

(a) Plaintiffs Prove No Pattern of Racketeering Activity

Interrogatory verdict No. 17 makes an award of $850,000.00 to plaintiffs under plaintiffs' RICO claim. It is respectfully submitted that as a matter of law such a verdict is insupportable essentially because (a) there was no evidence upon which a reasonable juror could rely to conclude that there existed a pattern of racketeering activities consisting of at least two predicate acts or (b) that plaintiffs sustained injury or damage to their business or property.

Absent the sale of the revenue bonds in question plaintiffs would have no legal basis to assert any of the claims which they have asserted in their lawsuit. Thus the sale of the bonds resides at the core of plaintiffs' claims. Indeed, plaintiffs' RICO damage claims are *predicated upon* the alleged violation of the securities laws sounding in fraud. Plaintiffs have fashioned their RICO claim from the *matrix* of their *securities law fraud claims.* As a result the predicates of plaintiffs' RICO claim are the alleged securities law fraud claims, namely, material misrepresentations in connection with the sale of the bonds.

It is axiomatic that in order to prove a substantive RICO violation under 18 U.S.C. Sec. 1962(c), plaintiff must prove four basic elements. One of the crucial elements is that plaintiff shall prove a "pattern of racketeering activity" consisting of *at least two predicate acts* as designated in 18 U.S.C. Sec. 1961(1). *United States v.*

Elliot, 571 F.2d 880 (5th Cir.) *cert. denied*, 439 U.S. 954 (1978); *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981).

As already demonstrated there exists no probative evidence upon which a reasonable juror could conclude that there was a material misrepresentation in connection with the sale of the bonds because (a) the alleged misrepresentations were not material, (b) there was no proof of any reliance, and (c) the alleged misrepresentations are not a cause-in-fact of any damage or injury. Thus plaintiffs produced no evidence upon which a reasonable juror could conclude that defendants committed "at least two predicate acts", i.e., material misrepresentations in connection with the sale of the bonds; consequently there was no probative evidence of a "pattern of racketeering activity", an indispensable element of recovery under RICO.

This legal rationale is equally applicable as to plaintiffs' claim based on wire fraud[101] and mail fraud.[102] This is self-evident because the "fraud" involved in the alleged mail fraud and wire fraud is the identical "fraud" involved in the securities fraud. Plaintiffs' pleading confirms this as a fact. Under Count 4, which is plaintiffs' RICO claim plaintiffs expressly incorporate "all of the preceding allegations of this complaint are incorporated herein by reference", (Par. 72) as the factual predicate for their RICO claim. Their succeeding paragraphs are but conclusory allegations of "mail fraud, wire fraud and the fraudulent sale of bonds in violation of the federal securities laws, as alleged herein". Thus the genesis of the RICO "fraud" is the material misrepresentations allegedly made in connection with the sale of the bonds,

which plaintiffs interposed by their conclusory allegations as the "scheme or artifice to defraud" element of their RICO claim. As a result, if the alleged "material misrepresentation fraud" of plaintiffs' securities law claim falls, necessarily plaintiffs' RICO fraud claim must likewise fall. As a matter of law plaintiffs failed to establish any RICO claim.

Excerpt from deposition testimony of Joseph D. Hancock taken June 24, 1985, pp.60-61

* * *

Q. Have you or your firm ever been suspended from practice before?

A. Ms. Barrasso, I cannot remember the exact terms of the settlement with the Alexandria Leased Housing Corporation, but I do not believe – I just can't recall specifically at this time. Our firm was suspended, I think, for five days by the National Association of Securities Dealers with a settlement of the Westside Habilitation sent to underwriting, and we were fined four thousand dollars.

Q. By the N A S D?

A. Cost and fine not to exceed that.

* * *

Excerpt from trial testimony of Hugh Baxley
taken January 28, 1987, pp. 59-60

* * *

Q Now, if in fact that two million four hundred and fifty-nine thousand dollars was for something else, then the reports that you have been filing with the State would be fraudulent, wouldn't they?

A If it was for something else and should not be included in the capital cost, that would be correct.

Q And you are aware of the Medicaid and the Medicare reimbursement laws, are you not?

A Yes.

Q And you are aware that those laws prohibit a party from making false representations in order to receive Medicaid reimbursements, are you not?

A Yes, sir.

Q And you certainly would not, yourself, participate in such a fraud, would you, Mr. Baxley?

A No.

Q Now, what was the information that you used to prepare these cost reports? Where did you get the information?

A That particular information, since Mr. Fryar was the operator of the facility at that time and the operations of it was that of like a sole proprietorship as far as he was concerned, he was running that through his business, we would simply take disbursements that he would make relative to Westside; and it was a separate payroll

account, as I remember. And then we would simply categorize those particular disbursements into proper categories and then report them accordingly on the cost reports.

Q Am I correct that you used Mr. Fryar's bank statements to prepare the cost reports?

A Bank statements and cancelled checks and this type thing, yes, sir, a combination of that.

* * *

UNITED STATES of America,
Plaintiff-Appellee,
v.
Joe E. FRYAR, Defendant-Appellant.
No. 88-4200.
United States Court of Appeals,
Fifth Circuit.
March 1, 1989.

Defendant was convicted in the United States District Court for the Western District of Louisiana, Donald E. Walter, J., of jury tampering and conspiracy to corruptly influence a jury. Defendant appealed. The Court of Appeals, E. Eugene Davis, Circuit Judge, held that: (1) evidence supported district court's finding that no improper visit to sequestered juror occurred warranting dismissal of that juror who claimed such a visit, and (2) juror's failure to disclose on voir dire prior conviction for driving while intoxicated did not deny defendant right to impartial jury.

Affirmed.

Appeal from the United States District Court For the Western District of Louisiana.

Before BROWN, JOHNSON and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Appellant, Joe E. Fryar, challenges his conviction following a jury's guilty verdict on eight counts of jury

tampering and conspiracy to corruptly influence a jury. We find no error and affirm.

I.

A jury convicted Fryar on eight counts of obstruction of justice, conspiracy, and aiding and abetting under 18 U.S.C. §§ 2, 371, and 1503. The charges stemmed from efforts to bribe three jurors during the trial of a civil case in the United States District Court for the Western District of Louisiana, in which Fryar was a defendant. The government presented evidence that Fryar conveyed bribe offers to two jurors using intermediaries. Two of those intermediaries testified for the prosecution.

On the government's motion, the district court sequestered the jury that was hearing Fryar's jury tampering case in a section of the Holiday Inn in Monroe, Louisiana. Two marshals were stationed in an end room at the head of the staircase; another was positioned in a room at the other end of the jurors' rooms. The drapes in both rooms were open. The marshals also placed yellow cones bearing "No Trespassing" signs at each end of the balcony.

As the jurors chatted in the courthouse jury room on Saturday, January 30, 1988, juror Steven Faulkner stated that a woman had come to his room about 1:30 a.m. Saturday. Several jurors, including Pam Guillot, advised him to report the visit to the marshals. Faulkner said he had told the marshals about the visit that morning, and then clarified his description of the visit. Faulkner, whose room, 250 was three doors down from the guards' command post room, told the other jurors that a young

woman had knocked on his motel door the night before looking for a fraternity party. He said he told the woman he knew nothing about the party and closed his door.

While the jurors watched a movie Saturday night in one on the hotel rooms, a dance scene prompted Guillot to ask Faulkner if the dancer looked like the woman who had come to his room the night before. Deputy Marshal James Rea overheard the remark and asked Guillot what she was talking about; she repeated Faulkner's earlier statements. Rea told two other marshals about the statement, after which the three marshals asked Faulkner to step out of the room. When they asked him which marshal he had told about the visit, Faulkner said he could not remember.

On Sunday morning one of the marshals told Deputy Marshal James Pleicones about Faulkner's statements. Faulkner repeated his story to Pleicones outside the presence of the other jurors. When Pleicones asked which marshal Faulkner has informed, Faulkner first said he had told Pleicones. After Pleicones denied being told, Faulkner said he must have told Deputy Marshal David Murphy. When Murphy also denied being told, Faulkner said he could not remember who he had told but added that juror Guillot would know. Pleicones then talked with Guillot alone, who recounted her jury room conversation with Faulkner but said she did not see Faulkner tell any marshals about the incident.

After the morning break on Monday, February 1, 1988, the district court recessed the trial temporarily to interview the marshals and jurors in chambers. The three marshals on guard duty during the Friday-to-Saturday

overnight shift told the court they neither saw nor heard anyone walking on the balcony or knocking on the jurors' doors. The district court then interviewed Faulkner and Guillot separately. Faulkner described the visit and its aftermath again. Guillot confirmed the jury room conversation with Faulkner but stated that she did not think the visit had occurred. Guillot also stated that the Faulkner incident would not influence her ability to decide the case fairly and impartially. The court did not ask Faulkner whether he still could decide the case fairly and impartially.

The district court then excused Faulkner from the jury over Fryar's objection. The court concluded that Faulkner lied about the visit, had continued to lie in the face of questioning, and thus was not fit to serve as a juror. Alternate juror Eddie Rice took Faulkner's place and eventually became the foreman. The court denied Fryar's motion to remove Guillot from the jury.

The court then interviewed the remaining jurors separately about the incident. Five said they believed the visit had not occurred, five thought it had occurred, and three said they were not sure. All said the Faulkner incident would not affect their impartiality. The court admonished each juror individually not to discuss the interview with the other jurors.

After reconvening, the district court instructed all of the jurors with Fryar's consent to draw no conclusions or inferences from Faulkner's excusal. Fryar moved for a mistrial on grounds that the taint of Faulkner's dismissal persisted because five jurors believed his story about the

visit. The court denied this motion and Fryar's renewed motion to excuse Guillot.

Fryar moved for a new trial after his conviction on grounds that the district court had excused juror Faulkner erroneously. During a post-trial hearing on the motion, Fryar presented Karen Gant and her sister, Juanita Woods, in an effort to prove that a woman had knocked on Faulkner's door early Saturday morning.

Gant testified that her sister had told her that a fraternity would be holding a party Friday night, January 29, 1988, in room 254 or 250 at the Holiday Inn in Monroe. She stated that she knocked on three or four doors in the 250-series while looking for the party; one person fitting the general physical description of juror Faulkner opened the door and told her she had the wrong room, according to Gant. She testified that she spoke loudly at the doors, saw no warning signs or open drapes, and saw nothing to distinguish the row of rooms from any other in the hotel.

Deputy Marshal Richard Frandsen also testified during the hearing about the placement of warning signs in the hotel stairwells. Frandsen, who was not on duty that Friday night, said he told each deputy of the sign requirement and, in anticipation of the fraternity party, warned them to be especially watchful Friday night. Frandsen stated that the warning signs were in open view each time he visited the hotel during the jury's sequestration. The district court concluded that Gant did not know for certain which doors she had knocked on that night and denied Fryar's new trial motion.

Following the sentencing and after filing notice of appeal, Fryar moved for release on bond pending appeal

and filed a supplement to the motion. The supplement alleged that juror Eddie Rice had failed to disclose a prior conviction for driving while intoxicated after being asked on voir dire whether he had ever been convicted of or pled quilty to a crime. The court, with the parties' consent, treated the supplement as a motion for a new trial and ordered a hearing. Rice acknowledged at the hearing that he had pled guilty to a D.W.I. charge in 1987. However, the court concluded that Rice had mistakenly but justifiably assumed that a D.W.I. conviction was considered a traffic offense rather than a crime, and denied Fryar's motion for new trial. Fryar appeals.

II.

1.

In his first attack, Fryar seeks to portray the alleged visit to Faulkner as an extrinsic influence on a juror regarding a matter pending before the jury, which creates a rebuttable presumption of prejudice to the defendant. *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954); *United States v. Webster*, 750 F.2d 307, 338 (5th Cir.1984), *cert. denied*, 471 U.S. 1106, 105 S.Ct. 2340, 85 L.Ed.2d 855 (1985). But the Faulkner incident is more properly characterized as juror misconduct given the district court's finding that the purported visit did not happen. As such, we review the district court's actions under the abuse of discretion standard. *See United States v. Dominguez*, 615 F.2d 1093, 1095 (5th Cir.1980); *United States v. Smith*, 550 F.2d 277, 285 (5th Cir.), *cert. denied sub nom. Wallace v. United States*, 434 U.S. 841, 98 S.Ct. 138, 54 L.Ed.2d 105 (1977). Further, the *Remmer* presumption of prejudice does not come into play here

even if we assume tht the contact occurred because absolutely no evidence suggests that the purported visitor tried to talk to Faulkner about the trial. *See Remmer*, 347 U.S. at 229, 74 S.Ct. at 451; *United States v. Burke*, 496 F.2d 373, 377 (5th Cir.), *cert denied*, 419 U.S. 966, 95 S.Ct. 229, 42 L.Ed.2d 182 (1974).

Fryar, relying heavily on the testimony of Karen Gant, argues that the district court erred when it concluded that no visit occurred and dismissed juror Faulkner. We cannot agree that the district court's resolution of this fact issue, based on the conflicting testimony of Faulkner, Gant and the marshals, is "wholly unsupported by the evidence." *See United States v. O'Keefe*, 722 F.2d 1175, 1178 (5th Cir.1983); *United States v. Granza*, 427 F.2d 184, 185 (5th Cir.1970).

Gant's testimony about the incident was imprecise and uncertain. She recalled that she knocked on doors 254 and 250 while searching for the party, yelled or talked loudly through the hotel doors, and stated that a short and sleepy-looking black man answered door 250. She also stated that she saw no warning signs, marshals or open drapes. But Gant, who testified that she was "vague" about the details of her search because she was anticipating the party at the time, repeatedly said she was not sure about particular room numbers.

The district court was entitled to weigh this equivocal testimony against the statements of the marshals on guard duty that night. The marshals stated that (1) they heard and saw no visitors in the hall that night; and (2) the placement of their guard posts – one of which was three doors down from Faulkner's room – made it

unlikely that a visitor could escape detection while knocking and yelling at the jurors' doors.

The marshal's testimony supports the district court's decision to reject Faulkner's testimony. The district court also was entitled to resolve the dipute about whether Faulkner reported the alleged visit to the marshals and conclude that Faulkner lied about reporting it. The court did not abuse its discretion in concluding that the visit did not occur and that Faulkner had lied.

The district court has the discretion to excuse an untruthful juror. *See Dominguez*, 615 F.2d at 1095; *Smith*, 550 F.2d at 285. Nor did the court exceed its discretion when it evaluated juror Guillot's statements, accepted her pledge of impartiality and refused to excuse her for lack of candor or her contacts with Faulkner. Her conversations with the marshals and the court related to the Faulkner incident, not to Fryar's case.

Similarly, the scope of an investigation into juror misconduct rests with the court's discretion. *Tillman v. United States*, 406 F.2d 930, 938 (5th Cir.), *vacated on other grounds*, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969). We detect no abuse of that discretion in the court's individual interviews with the jurors and marshals, or in its instruction that the jurors should draw no conclusions from Faulkner's dismissal. Nor do we detect any actual prejudice to Fryar from this incident. All of the remaining jurors affirmed their ability to decide this case impartially; we see no reason to doubt the district court's determination that they were sincere. *See Smith v. Phillips*, 455 U.S. 209, 217 n. 7, 102 S.Ct. 940, 946 n. 7, 71 L.Ed.2d 78 (1982).

We decline Fryar's invitation to presume that this juror misconduct prejudiced Fryar because the misconduct and investigation involved a sequestered jury hearing a jury tampering case. Fryar's reliance on *United States v. Shapiro*, 669 F.2d 593 (9th Cir.1982), is misplaced. In *Shapiro*, the Ninth Circuit held that the district court should have granted a mistrial after one juror attempted to extort money from a party in return for a favorable verdict. The Ninth Circuit concluded that the entire panel had been tainted because: (1) several jurors' responses to a special voir dire indicated that the jurors had discussed the case among themselves; and (2) the form of the district court's voir dire questioning planted the idea in jurors' minds that out-of-court misconduct by the prosecution or the defendants had prompted the questioning.[1]

---

[1] The Ninth Circuit included this excerpt from the trial transcript:

> THE COURT: Do you have any idea or suspicion about the reason for this questioning of you?
>
> JUROR CHUMLEY: I really hadn't thought about it, but no, I don't. It does make a person wonder. There obviously has to be a reason.
>
> THE COURT: Do you think this questioning has been occasioned by any out-of-court misconduct by the prosecution or any of the defendants?
>
> JUROR CHUMLEY: Now this is what I should have been – normally would have been thinking about during lunch and everything, but we had a large lunch and we have been playing cards and I really had not thought about it.

(Continued on following page)

Given this situation, the Ninth Circuit presumed that the defendants had been prejudiced. *Id.* at 603.

Fryar's case does not present such an egregious situation. The district court asked the jurors individually (1) what they had heard about the incident; (2) what inferences they drew from it; and (3) whether it would affect their ability to be fair and impartial. Unlike that court's questions in *Shapiro,* these generic questions do not suggest misconduct by either party.

Similarly, Faulkner's misconduct itself is insufficient to create a presumption of prejudice here. The Fifth Circuit considered *Shapiro* in a case in which a juror announced in the jury room before closing arguments had ended that the defendants "were guilty from day one [and] that he . . . wasn't listening to the argument." *Webster,* 750 F.2d at 336. The court dismissed the offending juror, interviewed the remaining jurors individually and concluded that they had not been tainted. *Id.* at 337. In refusing to adopt *Shapiro's* presumption of prejudice in these circumstances this court stated:

> (S)itting as we do far from the daily rigors of trial, we are in a particularly inappropriate position from which to judge the effect of a juror's premature expression of an opinion as to guilt on the minds of

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(Continued from previous page)

THE COURT: I am just planting thoughts in your mind, huh?

JUROR CHUMLEY: In a sense, yes.

Shapiro, 669 F.2d at 601. Another juror responded unequivocally that she did believe a party's misconduct had prompted the court's questioning. *Id.* at 602.

> the other members of the jury panel. That is precisely why we have traditionally left the manner of handling jury misconduct to the sound discretion of the trial judge. *Webster*, 750 F.2d at 338 (citations omitted). This reasoning applies with equal force to Fryar's situation.

Finally, Fryar asks us to find prejudice in the marshals' interviews with Faulkner and Guillot on Saturday and Sunday. Once again we perceive no abuse of discretion in the district court's refusal to grant a new trial based on these contacts. *See United States v. Albert*, 595 F.2d 283, 290 (5th Cir.), *cert. denied*, 444 U.S. 963, 100 S.Ct. 448, 62 L.Ed.2d 375 (1979). We also note that Fryar has waived any argument to excuse Guillot based on the contacts with marshals because he made no motion below to excuse her on these grounds.

2.

Fryar argues that juror Eddie Rice's failure to disclose on voir dire a prior conviction for driving while intoxicated denied him the right to an impartial jury. We review the district court's refusal to grant a new trial on these grounds for abuse of discretion. *United States v. Fowler*, 735 F.2d 823 (5th Cir.1984).

At the post-trial hearing Rice admitted that he had pled guilty to a D.W.I. charge in 1987. However, he stated that he did not remember hearing the question about prior convictions when the district court asked it generally of the jurors. Rice also stated that if he had heard the question he would have considered D.W.I. to be a mere traffic violation rather than a "crime;" he added that his lawyer told him it counted as a traffic violation.

The court concluded that Rice probably heard the question but did not purposely answer it untruthfully. The court noted a possible source of Rice's confusion in its colloquy with another juror; when that juror asked if traffic violations counted as "crimes," the court responded that speeding was not a crime. Under these facts we perceive neither an abuse of discretion by the district court nor any reason to presume bias to Fryar from Rice's inaccurate answer. *See United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir.1976). Thus, we find no merit in Fryar's companion argument that Rice's inaccurate answer impaired Fryar's ability to exercise his peremptory challenges.

3.

In his next point, Fryar claims that the district court improperly excluded evidence of prior grand jury testimony during his cross-examination of Richard Davis, who testified for the government under a grant of immunity. Davis testified that Fryar asked him to find a way to contact three jurors and get them to vote in Fryar's favor in the civil case. During an offer of proof outside the jury's presence, Davis stated that he had testified before grand juries in 1970, 1972 and 1983 or '84; he testified under a grant of immunity at the 1972 grand jury by appearance. The district court, finding that the potentially-prejudicial effect of the testimony exceeded its probative value, excluded the testimony under Fed.R.Evid. 403.

The scope of cross-examination and its limits rest with the district court's discretion. *United States v.*

Balliviero, 708 F.2d 934, 940 (5th Cir.), *cert. denied*, 464 U.S. 939, 104 S.Ct. 351, 78 L.Ed.2d 316 (1983). Fryar argues that Davis' prior grand jury appearances were crucial to his theory that Davis acted on his own in trying to bribe the jurors because he knew he could make a deal with the government if he got into trouble. We find no abuse of discretion in the court's conclusion that the danger of prejudice from evidence of a fifteen-year-old grant of immunity and two unrelated grand jury appearances dating back twenty-eight years outweighed the probative value. This history provides no significant support to Fryar's argument that the government would approve future grants of immunity.

4.

Finally, Fryar claims that the district court infringed his sixth amendment right to confront witnesses when it denied his request to reveal a confidential informant's identity.

Under *Roviaro v. United States*, 353 U.S. 53, 62, 77 S.Ct. 623, 628, 1 L.Ed.2d 639 (1957), courts must make disclosure decisions by balancing the individual's right to prepare a defense against the public interest in encouraging the flow of information from informants preserving their anonymity. In applying this test, this court has held that *Roviaro* does not require the disclosure of the identities of "mere tipsters." *United States v. Fischer*, 531 F.2d 783, 787 (5th Cir.1976); *see also United States v. De Los Santos*, 810 F.2d 1326, 1334-35 (5th Cir.) (informant's privilege overrides sixth amendement right to confrontation),

cert. denied, ___ U.S. ___, 108 S.Ct. 490, 98 L.Ed.2d 488 (1987).

After reviewing the sealed F.B.I. documents included in this record and the edited transcript from the civil trial hearing at which the F.B.I. first brought the information to light, we conclude that the informant was a tipster. The district court did not err in denying disclosure of the tipster's identity.

The court's judgment of conviction is AFFIRMED.

January 21, 1987 Transcript of Trial Proceedings (p. 80)

* * *

THE COURT: Well, I'm just talking. I say, it would have had to have come from Bermuda.

MR. SIMON: Why do you say that?

THE COURT: Where else could it have come from?

MR. WITTMANN: This document I'm talking about that Ms. Lodge identified, this was a letter sent to Kyle Schonekas from Owen Goudelocke –

THE COURT: But my question, before I hear the rest of the evidence, insofar as the jury's concerned, evidence that's relevant and admissible may be excluded because the prejudicial effect outweighs the probative value. Now, this indicates something, and may be very important to other people outside of this, that someone was trying to keep maybe a witness from testifying.

* * *

Federal Rule of Civil Procedure

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the

judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Federal Rule of Civil Procedure

Rule 51. Instructions to Jury: Objection

As the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the request prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987.)